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SUBJECT: FATA: PRIMER - JUDICIAL PROCESS AND DISPUTE RESOLUTION

REF: A) PESHAWAR 686 B) PESHAWAR 592 C) PESHAWAR 559

Introduction

1. This is the fourth in a series of primers on Pakistan's Federally Administered Tribal Areas (FATA). This cable describes how tribesmen in the FATA and Frontier Regions (FRs) resolve disputes in an area that is not subject to the laws that govern the rest of Pakistan. The concentration of judicial and executive powers in the hands of the Political Agent and the continued predominance of the Frontier Crimes Regulations of 1901 allow dispute resolution in the FATA to be heavily influenced by a small number of individuals whose actions are seldom subject to judicial review. Subsequent cables will address topics such as the 2001 "devolution" reforms. End Introduction.

The Colonial Legacy

2. The FATA and Frontier Regions do not have an independent judicial system. The Political Agent (PA) in the seven FATA agencies and the Assistant Political Agent (APA) in the six Frontier Regions exercise judicial as well as executive authority (Refs A and C). While this cable will examine the varying degrees of the PA/APA's authority in the FATA, the Frontier Crimes Regulation (FCR) of 1901 empowers these administrators to adjudicate disputes and to enforce their decisions.

3. The FATA's colonial legacy continues to play a dominant role in how tribesmen settle disputes today. The FCR was first established in 1871 as an attempt by the British to balance a need for better law and order with the tribes' fierce desire to remain independent in managing internal disputes. This compromise, which today remains intact under the 1901 iteration of the FCR, allowed the tribes to settle criminal and civil disputes according to tribal customs or "riwaj" when the political administration has no direct stake in the conflict. The jirga, or council of elders, remains the primary forum in which tribesmen negotiate settlement of disputes in the FATA and implement tribal custom. Jirgas also play a predominant role in the Provincially Administered Tribal Areas (PATA) and even the settled districts of the Northwest Frontier Province (NWFP) due to the common tribal heritage of the Pashtun people.

Jirga

¶4. A jirga is a gathering of two or more people convened to discuss and decide any issue ranging from personal affairs to inter-tribal blood feuds. A jirga may also be constituted to communicate a tribe's grievances to the government. The size and composition of a jirga depends on the scope of the issue under consideration. There is no quorum required to assemble a jirga. It is an informal institution characterized by sparse documentation and flexible processes which may be manipulated to best address a specific concern. A jirga begins after the parties to a dispute select a mediator who serves as the head of the council of elders. The mediator obtains consent from the disputing parties that the jirga's decision will be binding. Members of the council then consider the information provided by the disputing parties, deliberate, and come to a consensus decision.

¶5. A jirga's decisions are based on a combination of "riwaj" (tribal custom) and Sharia (Islamic law). Customary law among Pashtuns is informed by a strong sense of retributive justice (Badal), asylum (Melmastai) and forgiveness (Nanawatai). Riwaj may also be understood to be a body of informal and partially codified customs such as not carrying arms on Fridays. These customs vary widely between the tribes residing in the FATA. An informal system of precedent also plays an important role in tribal custom, and members of a jirga will often refer to past cases during deliberations.

Agreements vs. Undertakings

¶6. Jirgas interface with the FATA's political administration

through agreements and "undertakings." In an agreement, both the political administration and the tribe are parties to the jirga and are considered to be bound by its decision. An undertaking is a one-way notification or reiteration of a previous decision where tribesmen or the political administration agree to carry out a specific action. An undertaking may also be an official acknowledgement of riwaj by the political administration.

Limits of the Political Agent's Judicial Authority

¶7. A distinction is frequently drawn between "accessible" and "inaccessible" areas of Pakistan's tribal areas. Accessible areas include government installations such as forts, posts, cities, hospitals, schools, post offices, roads and tribal areas immediately adjacent to roads. Political Agents consider an area to be inaccessible if there are no security forces present such as the Frontier Corps and Khasadars (Ref. B). Inaccessible areas tend to be remote and inhabited by tribes hostile to government intervention in internal affairs.

¶8. The Political Agents have played a more significant role in the dispute resolution process in the accessible areas where they retain the right to appoint a jirga's elders. Disputants in civil cases such as land disputes, loan settlements or disagreements over women, however, frequently choose the members of a jirga by mutual consent. Political Agents refrain from interfering in cases where they do not have a direct stake. In criminal cases, the political administration is considered to be the "aggrieved" party and those charged with committing crimes are required to appear before a PA sponsored jirga. Political Agents are authorized to use enforcement mechanisms granted under the Frontier Crimes Regulation if the suspected criminal's tribe refuses to produce him or her. The jirga's decisions in the accessible areas are advisory, and Political Agents may choose to disregard them.

¶9. In the inaccessible areas, Political Agents indirectly supervise the judicial process. The distinction between civil and criminal cases does not apply as it does in the accessible areas because tribesmen settle both types of disputes via "riwaj." Although, the tribes may approach the Political Agent to seek assistance in resolving disputes, the majority of conflicts are settled by jirgas whose membership is determined by tribal elders who can render binding decisions.

¶10. The distinction between the Political Agent's role in the "accessible" and "inaccessible" areas is becoming less relevant with time. The Political Agent's influence over the dispute resolution process is greatest where relationships with the tribes are robust. Political Agents depend on tribal elders to garner support for their decisions, and the elders in turn look to the Political Agents for government funds. Lack of infrastructure has historically served as a hindrance to the Political Agents' ability to exert influence in the inaccessible areas. Thirty percent of the FATA has been, until recently, defined as "inaccessible." The deployment of nearly 100,000 security forces to the FATA and the acceleration of communications and infrastructure capacity have led many local observers to consider the whole of the FATA to be "accessible."

Right of Appeal

¶11. Tribesmen living in the FATA and FRs may not appeal a Political Agent's decision in Pakistan's High Courts or the Supreme Court. Instead, tribesmen may first request that the Political Agent constitute another jirga to reexamine the dispute. Influential families are generally more successful in convincing the Political Agent to convene a review jirga. If a review jirga is not deemed necessary or if the decision is still unfavorable, a tribesman may approach the FCR Commissioner in the NWFP Home Department for judicial review. Appeals against the decisions of the FCR Commissioner are heard by an FCR tribunal composed of the NWFP Home Secretary and Secretary of Law (Ref. C).

Enforcement Mechanisms

¶12. Political Agents are granted broad powers by the Frontier Crimes Regulation to enforce jirga decisions. An entire tribe may be held collectively responsible for the actions of an individual. Political Agents may also preemptively imprison individuals "acting in a hostile or unfriendly manner" towards the political administration. Other sections of the FCR allow Political Agents to levy fines, order the demolition of buildings and separate feuding parties.

¶13. In practice, Political Agents exercise their rights under the FCR by levying financial sanctions, imposing blockades and authorizing the use of force. If a tribe refuses to cooperate with the political administration, a Political Agent will first stop salaries to influential members of the tribe. Political Agents may then stop all government salaries, including Khasadar pay, and will seize the businesses and property of members of the offending tribe located anywhere in Pakistan. If noncompliant behavior continues, Political Agents will move to impose a blockade on the tribe (historically, using Frontier Corps forces). Roads in and out of tribal territory may be sealed in order to stop the flow of trade and foodstuffs to the offending tribe and any member of the tribe may be arrested. Political Agents are also authorized to use force in order to ensure compliance with jirgas' decisions. The use of tribal Lashkars, Levies, Khasadars, the Frontier Corps and, most recently, the Pakistani army, may be employed to enforce the writ of the government (Ref. B).

Current Strains on the Tribal Dispute Resolution System

¶14. Many aspects of the FATA's dispute resolution system have come under increasing criticism. Parties to a jirga are required to deposit money in order to have their case adjudicated. Increasing mediation costs and a growing perception of inaccessibility have led many tribesmen to seek alternate avenues of dispute resolution. The rise of militancy in Pakistan's tribal areas has led many to question the Political Agents' effectiveness. Dissatisfaction over delays in disputes mediated by the government has in part fueled the popularity of militants who make a point of providing "quick" justice. While the PAs remain the agency's chief executives, overlapping areas of operation with the military, as well as the

presence of militant commanders, have led to a perceived erosion of the Political Agents' authority.

¶15. Collective responsibility, preemptive imprisonment and lack of judicial accountability of the Political Agents remain highly contentious in the FATA. The principal of collective responsibility was promulgated in a time when members of a tribe were geographically proximate to one another. The FCR, as it exists today, allows Political Agents to punish members of a tribe who have no relationship with the offending individual and are often located in distant provinces. Preemptive imprisonment allows imprisonment of up to three years with no right of appeal except to the FCR tribunal who are often seen to rely on the opinion and records of the Political Agent's office. The FCR is also frequently criticized for lacking any mention of women's or children's rights.

¶16. This cable was cleared with Embassy Islamabad.
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